United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 879

Case No. 983: KARMEL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Deborah Taylor Ashford, Vice-President, presiding; Mr. Julio Barboza; Mr. Chittharanjan Felix Amerasinghe;

Whereas at the request of Lois Karmel, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 July 1997, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(a) *To rescind* the decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board awarding the Applicant damages for the unfair treatment she has received and directing that she be placed in a suitable post;

(b) *To find and rule* that the decision of the Respondent to abolish the Applicant's post and not to place the Applicant in her former job or in another permanent core post at the G-5 level in spite of numerous vacancies was motivated by prejudice and procedurally flawed;

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...

(e) *To order* that the Applicant be given full and fair consideration at the earliest opportunity for placement in a permanent, G-5 or higher level post;

(f) *To award* the Applicant appropriate compensation in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(g) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 30 March 1998;

Whereas the Applicant filed written observations on 23 April 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 7 July 1998, the Tribunal put questions to the Respondent and requested that he produce documents, which he did on 10 July 1998;

Whereas the Applicant submitted additional documents on 16 July 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 12 December 1973, on a three-month fixed-term appointment, as a Clerk/Typist, at the G-2 level. After serving on a further three-month fixed-term appointment as Bilingual Clerk/Typist, at the G-3 level, the Applicant was granted a probationary appointment, with effect from 1 April 1974. This appointment was converted to a permanent appointment on 1 December 1975. On 1 January 1977, the Applicant was promoted to the G-4 level. On 20 April 1980, she was transferred to the post of Secretary, Programme Division, Asia Section. On 16 March 1992, the Applicant was promoted to the G-5 level and her title changed to Principal Secretary.

On 26 January 1996, the Director, UNICEF Programme Division, informed the Applicant that the post that she encumbered, as Principal Secretary, had been slated for abolition. If the recommendation to abolish the post was accepted, her appointment would be terminated on 31 July 1996, unless the Administration could place her in another position. The notice period of termination was exceptionally extended until 31 August 1996, in the light of the Applicant's long service with UNICEF.

On 12 August 1996, the Applicant requested the Secretary-General to review the administrative decision to terminate her permanent appointment. She also requested a suspension of action of that decision. On 19 August 1996, in proceedings before the Joint Appeals Board (JAB), the Administration proposed to extend the Applicant's appointment for two months and place the Applicant in a vacant G-4 post.

On 22 August 1996, the JAB adopted its report on the request for suspension. Its conclusions and recommendation read as follows:

"Conclusions and recommendation

18. The Panel took note of the above mentioned UNICEF proposal and of the Appellant's consent to it. The Panel expressed its appreciation for the solution arrived at by UNICEF. The Panel would appreciate if during that period UNICEF were able to find a permanent solution to the Appellant's situation and keep her on board.

19. The Panel felt that since both parties have shown good will in making efforts to solve this case, there was no need at this stage to bring it before the Panel.

20. In view of the above, the Panel decided to make no recommendation on the request for suspension of action."

On 3 September 1996, the Applicant was transferred to the post of Help Desk Clerk at the G-5 level.

On 19 September 1996, the Under-Secretary-General for Administration and

Management informed the Applicant that, in the light of the recommendation of the JAB, the Secretary-General had decided not to grant her request for suspension of action.

On 17 October 1996, the Applicant requested the Secretary-General to review the decision to terminate her permanent appointment with effect from 31 October 1996. She also requested a suspension of action. The JAB adopted its report on 30 October 1996. Its considerations read, inter alia, as follows:

> "Considerations
>
> ...
>
> 27. ... the Panel unanimously recommends that the above-mentioned request for suspension of action be granted and that nothing be done by the Administration to implement the decision to separate the Appellant from service effective 31 October 1996 until the case has been heard on its merits and a decision has been made by the Secretary-General on the appeal."

On 31 October 1996, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

> "The Secretary-General has decided to accept the Panel's unanimous recommendation that action to separate you from service effective 31 October 1996 be suspended and to postpone until 20 December 1996 the termination date of your appointment, thus enabling the Joint Appeals Board to consider and provide a recommendation to him on the merits of your appeal. The Secretary-General waives his right to reply to your request for administrative review, allowing you to submit your appeal to the Board. In order for the Board to submit a report prior to your new termination date, it is anticipated that you will file your appeal with the Board by 15 November, that the Respondent will reply 10 days after receipt of a copy of your appeal, that you will be able to submit observations within 7 days after receipt of the Respondent's comments and that the Board will submit its recommendation to the Secretary-General by 13 December 1996."

On 1 November 1996, the Applicant was temporarily assigned to the post of Administrative Clerk.

On 13 November 1996, the Applicant lodged an appeal before the JAB.

The JAB adopted its report on 16 December 1996. Its considerations, conclusion and recommendations read, in part, as follows:

"Considerations

...

24. The Panel examined the record before it and, in particular, the documents attached by the parties, providing information on the available posts and the way staff members were considered for them. The Panel noted that, in addition to staff members with a permanent appointment, the Appellant had to compete against staff members on fixed-term appointments and project personnel.

...

26. The Panel ... felt that the Organization did not act in good faith in its efforts to place the Appellant. The Panel gained the impression that UNICEF merely went through the motions of fulfilling its legal responsibilities, but did not in fact seriously and energetically try to find a proper position for the Appellant. Bearing in mind that the Organization had suitable posts available, of which the Appellant['s] services at the G-4/G-5 level could be effectively utilized, the Panel felt that instead of fulfilling its obligations under Chapter IX, the Organization had in this case applied a policy appropriate for competitive examination or for recruitment, a policy totally inappropriate in the present case.

27. The Panel noted the Respondent's explanation that the Appellant's right to be given preference under this rule 'could not be applied when compared with the skills and competence of other candidates, for which the APC had due regard in all cases, and therefore, she was not found to be the most competent candidate'. The Panel disagrees with the above statement. The Panel felt that, in the light of Judgement No. 679, Fagan, preference under staff rule 109.1(c) must be the determining factor.

...

28. In addition, the Panel did not find the Respondent's explanation referred to in the paragraph above to be compatible with the Respondent's statement of 19 August 1996 before the JAB Panel, considering the Appellant's request for suspension of action. [The] Respondent then stated that '[t]he Appellant specifically requested a

suspension of action of her separation based on her statement that she is a permanent staff member with almost 23 years of service who has given the best of her occupational life to UNICEF, and her work performance met all the requirements. This is not in dispute'. (Emphasis added).

29. The Panel considered that the Appellant, together with other staff members holding a permanent appointment whose posts were abolished, should have been placed against the vacant posts that were available for which their services can be effectively used. The Panel considered that a selection process from among staff members holding permanent appointments could take place only in situations where the number of available posts was smaller than the number of the staff members concerned. Staff members on fixed-term and other non-permanent appointment and others should be considered only after the situation with permanent staff had been resolved.

30. The Panel noted that while awaiting the Secretary-General's decision on her case, the Appellant was placed against a post at her level, for which she was suitable. The Panel saw no reason why the Appellant should be removed from that post.

31. In light of the above and in particular of UNICEF's selection process, the Panel felt that the decision to terminate the Appellant's appointment was taken not because of the necessity of the Organization to reduce staff, but because UNICEF did not want the Appellant to remain in service. Consequently, the Panel considered that the decision in question was affected by extraneous motives and therefore violated the Appellant's rights. The Panel noted that Chapter IX of the Staff Regulations provided a procedure for termination of appointment due to unsatisfactory performance, and that UNICEF did not utilize this procedure in this case.

Conclusion and Recommendations

32. The Panel recommends that UNICEF find, without further delay, a suitable post for the Appellant, where she will be able to utilize her skills and the experience she gained in the Organization. No action should be taken to terminate the Appellant's permanent appointment.

33. Having concluded that the Appellant was unfairly treated in connection with the termination of her permanent appointment, the Panel further recommends that the Appellant be paid the equivalent of three months' net base salary."

On 20 December 1996, the UNICEF Deputy Executive Director informed the Applicant that the Executive Director had decided "not to take action to terminate your permanent appointment, and that you will be appointed to a post by executive decision."

On 23 December 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. The Secretary-General has been pleased to receive information from UNICEF to the effect that the Executive Director has decided not to take action to terminate your permanent appointment. In light of this decision, the object of your appeal is now moot. The Secretary-General also considers that, given the good efforts made by UNICEF to find you another posting, the granting to you of an amount equivalent to three months net base salary is not warranted."

On 20 January 1997, the UNICEF Personnel Officer informed the Applicant that she had been transferred to a project-funded post in the UNICEF Division of Communication with effect from 7 January 1997, allowing her to retain her G-5 level and permanent status, although the post was classified at the G-4 level.

On 22 July 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to abolish the Applicant's core post was in violation of the letter and spirit of UN staff regulation 9.1(a).

2. The Respondent has failed to apply in good faith the established policies for placement of staff in abolished posts with respect to the Applicant.

Whereas the Respondent's principal contentions are:

1. The Organization had taken steps with respect to the Applicant which actively

demonstrated its good faith. The Applicant has adduced no evidence of discriminatory treatment.

2. The Applicant's appointment was not terminated and a suitable alternative post was found for her.

The Tribunal, having deliberated from 7 to 31 July 1998, now pronounces the following judgement.

I. The Applicant alleges (a) that her post was not in fact abolished, since nearly all of its defining functions were passed on to a newly created post, to which someone else was appointed without any advertisement or open competition, and (b) that the Administration did not make a good faith effort to find the Applicant a new position equivalent to her abolished post.

II. If the Applicant's first claim is correct, the Tribunal would not need to consider her second claim. The Tribunal is of the view that it need not address the issue of whether or not the Administration made a reasonable effort to secure for the Applicant a post equivalent to the one formerly encumbered by her, from among the numerous vacancies for which the Applicant applied. It is sufficient that the Tribunal has determined that the post she originally encumbered was not in fact abolished, that she was deviously and unjustly removed from it, and therefore, that the Applicant was improperly separated from the position she encumbered.

III. Moreover, although the Applicant has finally been placed against a post which seems to be equivalent to the one she originally encumbered, the post is of fixed duration. In response to questions put by the Tribunal during its deliberations, the Respondent stated as follows:

"The Applicant is a Senior Secretary in the Division of Human Resources (DHR).

(a) The Applicant encumbers post 92020 of Senior Secretary.
(b) The grade of the post is GS-5. The Applicant's personal grade level is GS-5.
(c) The Applicant's post is of fixed duration, however, the Applicant was informed in writing that she maintains her permanent status."

The Tribunal finds that placing the Applicant in "a post of fixed duration" is not an adequate solution because she should be placed in a permanent position.

IV. But that does not, of course, close the case. The Applicant was obviously the victim of a serious wrong committed by the Administration when her post was abolished without any justification. In this case, the Applicant's post was abolished, and a practically equivalent post was created, with a different name and a slightly different job description at one grade lower in the hierarchy. The Applicant could not apply for the newly created post because she was at the G-5 level. Without advertisement or open competition, another staff member who had been placed against the post was appointed to that "new" post. A year later, the post was upgraded to G-5. The Tribunal can only conclude that the Applicant's post was not abolished and that the process just described constituted a subterfuge for removing the Applicant and replacing her with another staff member.

V. Unfortunately, the manipulations to which the Applicant was subject are becoming a habit in the UN Administration. The Tribunal notes that by this simple device, some staff members are dismissed and others are placed in their stead. It seems to be of no importance if, at the end of the process, the Organization has to pay compensation to the person unjustly removed. The Tribunal is not aware whether any action is taken against those responsible for such elementary exercise in deviousness. The Tribunal, more than once, has come across situations like the one just described. (Cf. Judgements No. 679, Fagan, para. XIII (1994) and No. 890, Ossolo, para. V (1998)).

VI. It appears that the only way that the Administration could remove the Applicant from her position was to abolish her post. In further response to questions put by the Tribunal during its deliberations, the Respondent stated that:

> "In accordance with UNICEF procedures, staff on abolished posts are automatically placed against posts at their own level, for which the Organization considers them to have the requisite qualifications."

That was not precisely the case of the Applicant. The JAB found as follows:

> "The Panel, after reading the material before it, felt that the Organization did not act in good faith in its efforts to place the Appellant. The Panel gained the impression that UNICEF merely went through the motions of fulfilling its legal responsibilities, but did not in fact seriously and energetically try to find a proper position for the Appellant."

VII. It was only after the JAB recommended that "UNICEF find, without further delay, a suitable post for the Appellant" and that "three months' net base salary" should be paid to her as an indemnity, that a new job was found for her. And only then did the Administration decide that "given the good efforts made by UNICEF to find you another posting, the granting to you of an amount equivalent to three months net base salary is not warranted." So, the case was, in the opinion of the Administration, moot.

VIII. The Tribunal, however, does not consider that the case is moot. The Applicant was subjected to a rather long and frustrating process of applying for 34 different posts, without support from the Administration. The Applicant should be compensated for the anguish of not knowing whether she was going to be separated from the Organization; the humiliation of not receiving any permanent post for which she applied; and the stress to which she was subjected by the conduct of the Administration.

IX. Accordingly, the Tribunal orders:

(1) That the Applicant be placed in a permanent post, equivalent to the one she encumbered before the artificial abolition of her own, within 12 months of the date of communication of this judgement;

(2) That, should the Respondent decide that, in the interest of the United Nations, the Applicant should be compensated without further action being taken in her case, in accordance with article 9, paragraph 1 of the Tribunal's Statute, the amount of compensation to be paid to the Applicant, in lieu of the specific performance ordered. be fixed at 15 months of her net base salary at the rate in effect on the date of payment; and

(3) That, in addition to the orders specified in (1) and (2) above, compensation be awarded to her in the amount of nine months of her net base salary at the rate in effect on the date of this judgement.

X. The Tribunal rejects all other pleas.

(Signatures)

Deborah Taylor ASHFORD
Vice-President, presiding

Julio BARBOZA
Member

Chittharanjan Felix AMERASINGHE
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary